No. 16-8255

In The
Supreme Court of the United States

ROBERT MCCOY, *PETITIONER*,
v.
STATE OF LOUISIANA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 members with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

Amicus has a particular interest in this case because the Supreme Court of Louisiana's decision concerns the practice and expertise of criminal

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than *amicus* or its counsel made such a monetary contribution. The parties have consented to the filing of this *amicus* brief.

defense lawyers and the proper constitutional protections for criminal defendants.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Florida v. Nixon*, 543 U.S. 175 (2004), this Court addressed a situation in which a defendant's counsel explained that he would concede guilt at the guilt phase of a capital trial, and the defendant neither granted nor withheld consent. The Court did not consider the materially different circumstances presented when a defendant expressly instructs his lawyer not to concede guilt at the first phase of a capital trial.

When a defendant provides such an explicit instruction to his attorney, the client's decision must control on that fundamental issue. Indeed, perhaps no decision is more fundamental to one criminally accused than whether to concede guilt on the charged offense. That decision belongs to the defendant, not to the lawyer, and, when the defendant communicates an express desire on that ultimate issue, the lawyer must heed it.

As Petitioner explains, this right is embedded as a Constitutional guarantee in both the text and origins of the Sixth Amendment. Pet'r's Br. 21-32. *Amicus* agrees with Petitioner's analysis of the foundation of this fundamental right. In addition, and relatedly, this Court has emphasized that the Fifth and Sixth Amendments reflect a core principle that must be honored on an issue as central to a criminal trial as the decision whether to concede guilt: respect for the individual rights and decision-

making of the defendant, whose life and liberty are at stake.

To be sure, in serving their clients, defense lawyers recognize that conceding certain issues can sometimes be a sound trial strategy. This strategy, however, cannot subvert core constitutional protections or deprive the defendant of the basic right to present a defense. Accordingly, defense lawyers may not concede guilt over a client's express objection. Permitting defense counsel to do so usurps the defendant's ability to make the most critical decision in responding to the State's threat to the defendant's life and liberty.

ARGUMENT

THE ACCUSED'S EXPRESS DECISION WHETHER TO CONCEDE GUILT IS PROTECTED BY THE FIFTH AND SIXTH AMENDMENTS

A criminal defendant's decision whether to concede guilt implicates core principles and fundamental constitutional rights. The right to exercise that decision on the central issue of the criminal proceeding is protected under the Fifth and Sixth Amendments. Accordingly, defense lawyers must honor a defendant's express decision to maintain his innocence and not concede guilt.

A. Failure To Heed A Client's Decision To Maintain His Innocence Violates Fundamental Rights

A criminal defendant's express refusal to concede guilt is safeguarded by core constitutional protections. A defendant retains the "ultimate

authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). These decisions are grounded in inherently personal rights, and fundamental fairness requires that the accused retain the autonomy to decide them. *See Gonzalez v. United States*, 553 U.S. 242, 250 (2008). A concession of guilt by the defense lawyer where the defendant's clear and unequivocally expressed decision is to maintain his innocence necessarily injures these constitutional protections.

1. Conceding Guilt Against a Client's Express Desire Compromises the Fundamental Right to Plead Not Guilty

Allowing counsel to concede guilt over the client's express objection would deprive the defendant of his fundamental right to plead not guilty. The plea decision is an indispensable choice for the defendant alone to make. *Jones*, 463 U.S. at 751; *see also Gonzalez*, 533 U.S. at 247-48. And defense counsel is ethically required to follow the client's plea decision. *Jones*, 463 U.S. at 753 n.6; ABA Model Rules of Prof'l Conduct, r. 1.2 (2016). Indeed, if defense counsel seeks to enter a guilty plea on behalf of a client, the record must be clear that the client has given informed consent to the guilty plea. *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

Through a plea of not guilty, the defendant requires the prosecution to carry its constitutional burden and prove his guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *see also Cooke*, 977 A.2d at 843. The decision to plead

not guilty reflects the defendant's choice of his ultimate trial objective: to secure an acquittal. Regardless of the lawyer's view of the likelihood of success, a refusal to honor this particular wish of the defendant has been recognized as a severe infringement of the client's constitutionally protected decision to plead not guilty. *See, e.g., Cooke*, 977 A.2d at 843. Moreover, in defying the defendant through this unauthorized concession, counsel unfairly and irrevocably eliminates potential arguments otherwise available to a client choosing to plead not guilty. *People v. Bergerud*, 223 P.3d 686, 699 (Colo. 2010).

To be sure, in circumstances where the defendant has expressed no opinion about conceding guilt, this Court has held that a concession of guilt is not the functional equivalent of a guilty plea. *Nixon*, 543 U.S. at 187-88. When a defendant expressly and unequivocally objects to conceding guilt, however, such a concession by counsel necessarily infringes on the defendant's fundamental choice to plead not guilty. By conceding guilt over the client's express desire to plead not guilty, defense counsel violates the constitutional protections enshrined in the Fifth Amendment (with its protection against self-incrimination) and the Sixth Amendment (with its right of the criminal defendant to "the Assistance of Counsel," rather than a requirement of submission to counsel on guilt-or-innocence).

2. Conceding Guilt Against a Client's Express Desire Compromises the Fundamental Right Regarding Testimony on One's Own Behalf

The decision of a defendant to testify on his own behalf is a right essential to our adversary system. *Riggins v. Nevada*, 504 U.S. 127, 144 (1992). Indeed, every criminal defendant is privileged to testify in his own defense, or to refuse to do so. *Rock v. Arkansas*, 483 U.S. 44, 53 (1987). Here too, however, defense counsel's decision to concede guilt over the defendant's express objection effectively nullifies this right. *See, e.g.*, *Bergerud*, 223 P.3d at 702; *Cooke*, 977 A.2d at 843-44; *State v. Anaya*, 592 A.2d 1142, 1147 (N.H. 1991).

The right to testify and maintain one's innocence, or to remain silent in one's own defense, would be illusory if counsel could pursue a strategy to concede guilt despite the defendant's objection. Should a defendant testify to his innocence, his counsel's concession would effectively instruct the jury to ignore the defendant's statements. *See Bergerud*, 223 P.3d at 702. Moreover, where a defendant may want to remain silent, he may feel forced against his wishes to testify on his own behalf to defend against his own counsel's concession of his guilt. Such a result renders the client's individual right to decide whether to testify meaningless.

The decision whether to testify on one's own behalf is a fundamental choice reserved for defendants alone. *Jones*, 463 U.S. at 751; *Riggins*, 504 U.S. at 144 (1992); *Rock*, 483 U.S. at 52-53; *see also Cooke*, 977 A.2d at 843. To allow counsel to

contradict the essence of the defendant's decision regarding testimony would make counsel the "master" rather than the "assistant" and thus strip the defense of the personal character that the Constitution demands. *Faretta v. California*, 422 U.S. 806, 820 (1975); *see also Bergerud*, 223 P.3d at 702.

B. A Defense Lawyer's Trial Strategy May Not Override A Client's Express Decision To Maintain Innocence

Defense counsel may not employ a trial strategy that overrides a defendant's express decision to maintain innocence. Certainly, conceding particular factual or legal issues at trial can sometimes be a useful trial tactic, and many concessions will not rise to the level of constitutional harm. Indeed, at times, conceding guilt may be a reasonable strategy in capital cases. Despite these potential strategic advantages, however, a defense lawyer's preferred approach on the core issue of guilt or innocence may not supersede the defendant's express, constitutionally protected decision to maintain innocence.

1. Making Concessions Can Be a Sound Trial Strategy

Careful and strategic concessions may play a legitimate role in criminal cases. Concessions may, for example, preserve credibility or focus the jury's attention on the most material and advantageous issues in a case. Particularly in bifurcated capital cases, concessions of guilt at times may seem helpful in focusing the jury's attention on the penalty phase

and limiting the jury's exposure to damaging facts. *Nixon*, 543 U.S. at 562-63.

The determination, however, on this bedrock issue—the guilt or innocence of the defendant—cannot supersede express constitutional protections that guard a defendant's dignity and autonomy. *See McKaskle v. Wiggins*, 465 U.S. 168, 176-78 (1984) (recognizing a defendant's dignity and autonomy interests in his case); *Faretta*, 422 U.S. at 834 (finding the right to self-representation at trial grounded in part in a respect for individual autonomy); *see also Cooke*, 977 A.2d at 842 ("[T]he defendant has autonomy to make the most basic decisions affecting his case . . . .").

2. Regardless of Potential Strategic Advantages, Defense Lawyers May Not Override a Client's Express Desire to Maintain Innocence

In general, a lawyer has "full authority to manage the conduct of the trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1998). As a result, a lawyer typically does not need to obtain the client's consent for every tactical trial decision. *See, e.g., id.*; *New York v. Hill*, 528 U.S. 110, 114 (2000) (decisions about scheduling and certain evidentiary objections); *Jones*, 463 U.S. at 751 (decisions about nonfrivolous appellate arguments). But a client's decision to maintain his innocence does not constitute mere "trial conduct" or a plain-vanilla strategic decision. Rather, the decision whether to concede guilt goes to the heart of the defendant's right to present a defense to a jury of his peers.

In a capital case, conflicts may arise between a defense lawyer's desire to determine trial strategy and the defendant's decision whether to concede guilt. For example, a lawyer has a duty to zealously pursue her client's best interests. *See* Model Rules of Prof'l Conduct r. 1.3 cmt. 1 (Am. Bar Ass'n 2016) ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). As a result, a lawyer may, in her professional judgment, conclude that conceding guilt is the course most likely to secure a sentence other than death. The accused nevertheless may wish to maintain a claim of innocence at trial, perhaps because he values even a remote possibility of an acquittal more than he values the difference between a sentence of life or death. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1178 (2010). This can create a sense of conflict for even the most ethical attorney. *See People v. Frierson*, 705 P.2d 396, 404 (Cal. 1985) ("[A] defendant's right to insist that a defense be presented . . . will inevitably impinge on defense counsel's handling of the case."); *see also Cooke*, 977 A.2d at 841-42.

Our Constitution places this profound decision in the hands of the defendant. The choice of whether to maintain innocence is not a mere matter of trial strategy, but instead a fundamental individual right belonging to the defendant. *See Jones*, 463 U.S. at 751; *see also Frierson*, 705 P.2d at 402 ("[A]lthough it is sometimes stated, as a rule of thumb, that matters of trial strategy and tactics rest exclusively within the discretion of counsel, the fact that the trial attorney's [decision to forgo presenting a defense] . . .

was motivated by strategic considerations does not foreclose inquiry into whether the decision . . . was of such fundamental importance . . . that [the] defendant's wishes should have been respected." (internal quotation marks and citation omitted)); Model Rule of Prof'l Conduct r. 1.2(a) (requiring lawyers to "abide by a client's decisions concerning the objectives of representation").

As this Court has noted, "[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." *Faretta*, 422 U.S. at 834; *see Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) ("[T]he defendant's right to conduct his own defense . . . . is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." (citing *Faretta*, 422 U.S. at 834)); *Frierson*, 705 P.2d at 403 ("Given the magnitude of the consequences that flowed from the decision whether or not to present any defense . . . counsel could [not] properly refuse to honor [the] defendant's clearly expressed desire to present a defense . . . ."). Counsel may not "demand that the defendant follow what counsel perceives as the desirable course," because ultimately, the defendant is entitled to make those fundamental trial decisions that are so critical to his fate. Standards for Criminal Justice: Prosecution Function & Defense Function, pt. 1, Standard 4-5.2 (Am. Bar Ass'n 1993).

Even in the most dire of circumstances, those affecting the potential for the death penalty, the decision whether to concede guilt remains in the defendant's purview. The Court has recognized that

a defendant's right to make fundamental decisions about his case, such as whether to represent himself, stems not from "the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law." *Wiggins*, 465 U.S. at 198 n.6 (internal quotation marks omitted); *see Faretta*, 422 U.S. at 834 (recognizing that "although [a *pro se* criminal defendant] may conduct his own defense ultimately to his own detriment, his choice [to represent himself] must be honored out of 'that respect for the individual which is the lifeblood of the law'"). Thus, the accused is entitled to decide whether to concede guilt, and counsel must honor that decision, regardless of whether, in the counsel's view, the decision to maintain a claim of innocence likely will prove detrimental. *See Frierson*, 705 P.2d at 404 (recognizing that when "a defendant chooses to exercise a personal right . . . over counsel's contrary advice[,] . . . . the attorney's obligation is simply to provide the best representation that he can *under the circumstances*" (emphasis in original)); 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 23 cmt. C, at 186 (2000) ("However, a lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action.").

3. Permitting Defense Lawyers to Override a Client's Express Desire to Maintain Innocence Undermines the Attorney-Client Relationship

The relationship between defense counsel and client is the cornerstone of ensuring the proper, efficient, and just administration of justice. That relationship, however, would be irreparably damaged should a defense lawyer be permitted to concede guilt against the accused's express objection.

The fundamental faith and trust placed by the defendant in his attorney would evaporate. Rather than a zealous advocate for his interests, the defendant would now view the lawyer as yet another impediment to maintaining his innocence and securing an acquittal. In addition, a client's comfort in confiding in his counsel would be hindered by the well-founded concern that information shared by the defendant could result in a concession of guilt against his wishes. Other aspects of the accused's defense also would be injured. Most fundamentally, many defendants might well decide that the only avenue to preserve their ability to not concede guilt would be to proceed *pro se* and remove a defense lawyer from the equation entirely. Defense counsel, meanwhile, will be faced with the deeply problematic challenge of determining whether (and when) they should defy their client and concede guilt, over the client's objections.

Defense counsel enjoy latitude regarding certain trial tactics. Such discretion, however, may not overcome the fundamental rights of the accused.

Accordingly, counsel cannot override a defendant's decision to maintain his innocence.

C. Defense Lawyers Have Strategic Options Beyond Conceding Guilt

Defense counsel in a capital case may wish to concede guilt in order to preserve credibility for the penalty phase. To the extent a defendant provides clear and express instructions not to concede guilt, however, defense lawyers have other strategic and tactical options to retain credibility.

First, and perhaps most significantly, defense counsel can emphasize that the government must be put to its proof, with the formidable protection for the defendant of a requirement of proof beyond a reasonable doubt. *In re Winship, supra*; *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Jackson v. Virginia*, 443 U.S. 307 (1979). This requirement can be emphasized by defense counsel in both opening statement and closing argument, and, of course, the court will instruct the jury regarding this burden. *Victor v. Nebraska*, 511 U.S. 1 (1994).

Second, during trial, defense counsel has many legitimate options for attacking the government's case, without conceding guilt. These may include challenges to the admissibility of evidence, challenges to the reliability of evidence, conduct of cross-examination, and vigorous advocacy on jury instructions and legal motions. There are many opportunities to act as an effective advocate while retaining credibility with the jury; but those otherwise effective measures are completely undermined when counsel concedes guilt over the defendant's objection.

Finally, even should a jury determine that the government has met its burden of proving guilt beyond a reasonable doubt, the penalty phase still presents defense lawyers with an opportunity to present extensive mitigating evidence on behalf of the defendant. *See, e.g.*, Welsh S. White, Litigating in the Shadow of Death 85 (2006). Defense lawyers may present witnesses and available evidence regarding the defendant's character, family history, community, and other factors relevant to who the defendant is beyond his crime. *See* Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1592 (1998). Through this mitigating evidence, counsel can provide jurors with a fuller understanding of the defendant, as well as a sound basis to appreciate that the accused remains an individual worthy of their compassion and empathy, or an individual who does not otherwise merit society's most severe sanction. *Id.*

* * * * *

Permitting a defense lawyer to concede guilt against a defendant's express desire violates core, fundamental rights. Although such a concession may be viewed by a defense lawyer as in the client's strategic best interests, a defendant's express desire to maintain innocence may not be overridden. Defense lawyers must honor that decision and zealously defend the accused with the full range of remaining strategic and tactical options.

CONCLUSION

For the reasons stated above, the decision of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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